No. 42944-6-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SHILA J. WYATT,
Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Shila Jean Wyatt, was convicted of vehicular assault by operating or driving a vehicle "[i]n a reckless manner and caus[ing] substantial bodily harm to another." RCW 46.61.522(1)(a). The issue of bodily harm was not in dispute; the only issue at trial was whether Ms. Wyatt drove recklessly. The State's evidence showed she drove up to ten miles over the speed limit and significantly under the speed limit, that she swerved over the lane lines, and that, after crossing the centerline, she hit a motorcyclist driving on the fog line of his lane. There was no evidence she was intoxicated, joy riding, or driving at excessive speeds.

On appeal, Ms. Wyatt argues the trial court made two errors in the admission of evidence that both individually and cumulatively prejudiced her. First, the trial court abused its discretion in admitting an unredacted 911 recording and transcript in which a credible eyewitness described Ms. Wyatt as "a drunk driver" when the State acknowledged it had no evidence

Ms. Wyatt was intoxicated and it was not attempting to prove intoxication. Such evidence was both irrelevant and unfairly prejudicial.

Next, it abused its discretion when it excluded testimony of the State's expert on collision reconstruction regarding his conclusions, based on his examination of the accident site and interviews with witnesses, as to how Ms. Wyatt was driving. The witness would have testified he believed Ms. Wyatt was driving negligently. Both of these errors prejudiced Ms. Wyatt and require reversal.

Finally, Ms. Wyatt argues the State failed to prove the charged crime when it did not establish she drove the vehicle in a rash or heedless manner indifferent to the consequences.

ASSIGNMENT OF ERROR

A. Assignment of Error

1. The trial court erred in denying Ms. Wyatt's motion to exclude admission of the portion of the 911 tape and the accompanying transcript in which the caller stated Ms. Wyatt was driving while drunk.

2. The trial court erred in excluding evidence that the state trooper who originally investigated the accident believed Ms. Wyatt drove in a negligent manner and the matter required no further investigation.

3. The trial court erred in allowing the issue of Ms. Wyatt's guilt to go to the jury when the evidence was insufficient to convict as a matter of law.

B. Issues Pertaining to Assignment of Error

1. When intoxication is evidence of reckless driving and the State acknowledged it had no evidence Ms. Wyatt was intoxicated at the time of the accident, did the trial court admit irrelevant and unfairly prejudicial evidence in refusing to order redacted a 911 recording and transcript in which a credible eyewitness reported Ms. Wyatt was "a drunk driver"?

2. When State Trooper Orf was an expert in collision reconstruction; had interviewed Ms. Wyatt, the victim, and a witness the night of the accident; and had investigated the accident site, did the trial court abuse its discretion in excluding Orf's

conclusions, based on his investigation, that Ms. Wyatt was driving negligently at the time of the accident?

3. When the State proved Ms. Wyatt drove both ten miles over and under the speed limit, swerved over the lane lines, pulled off the road to let a driver pass, and hit a motorcycle on the fog line after crossing the centerline, but provided no evidence she was driving at excessive speeds, joyriding, or intoxicated, did the State fail to prove she drove the vehicle in a rash or heedless manner indifferent to the consequences?

III. STATEMENT OF THE CASE

A. Procedural History

Following a traffic accident on November 10, 2009, Ms. Wyatt was cited with two traffic infractions, negligent driving in the second degree under RCW 46.61.525 and driving without proof of vehicle liability insurance under RCW 46.30.020. Clerk's Papers 15-16 (copy of citation). Ms. Wyatt contested the citation. Following a hearing attended by Ms. Wyatt but not any other witnesses, the court dismissed the

negligent driving charge on the grounds of insufficient evidence and allowed Ms. Wyatt the opportunity to show her use of the vehicle was insured. CP 17-23 (transcript of hearing).

The matter was apparently reopened at the request of the father of the person injured in the accident, Clifford Ziesemer, a lieutenant in the Thurston County Sheriff's Office. Verbatim Report of Proceeding for 11/15/11 and 11/16/11 (VRP) 70, 97. A year and a half after the accident, by information filed May 3, 2011, the State charged Ms. Wyatt with Vehicular Assault for the same accident for which she was originally cited. The State alleged Ms. Wyatt drove a vehicle in a reckless manner and caused substantial bodily harm to another in violation of RCW 44.61.522(1)(a). CP 3.

Ms. Wyatt moved to dismiss the case on double jeopardy grounds. CP 4-23. The trial court, the Honorable Christine Pomeroy presiding, ruled double jeopardy did not attach because the negligent driving charge was a traffic infraction which is a civil, not a

criminal matter. CP 83; Verbatim Report of Proceeding for 10/17/12 at 20-22.

Prior to trial, defense counsel moved to exclude mention by a witness who called 911 of the belief that Ms. Wyatt was a drunk driver. Counsel argued the statement should be excluded because there was no evidence Ms. Wyatt was intoxicated at the time of the accident. VRP 10. The State agreed it was not attempting to prove vehicular assault through the intoxication prong of the statute and acknowledged it had no evidence Ms. Wyatt was driving while drunk. VRP 10-11. It argued the evidence should be admitted because the witness "just describes what she sees." VRP 10. "She called to report what she thought was a drunk driver. It didn't turn out that it was a drunk driver." VRP 11. The State offered to instruct the witness not to mention this belief in her testimony, but argued it should not have to redact the 911 recording to eliminate such references. The State explained, "I would have to take some time redacting and somehow get around that." VRP 11.

Defense counsel maintained the evidence should not be admitted as it had "no probative value whatsoever" and "the mere mention that the person thought she was reporting a drunk driver" was "irrelevant and prejudicial." VRP 11.

The court, the Honorable Paula Casey presiding, asked the State to instruct its witness not to mention the belief, but declined to order the recording of the 911 call redacted. VRP 11-12. The court stated, "I think that the reference to a drunk driver when reporting erratic driving behavior is a lay way of saying this is what it appears to me." VRP 11. Counsel and the court later clarified that counsel's objection to the 911 recording extended to the transcript of the recording handed out to the jurors while the recording was played. VRP 193-94.

During trial, defense counsel sought to elicit evidence of the original traffic citation to show the state trooper at the scene of the crime, Troy L. Orf, believed the accident merely showed negligence. VRP 97, 101-02. Counsel argued Orf determined it was a

negligent driving situation requiring no further investigation. VRP 101-02. "That I think tells the jury what they need to know about what happened that night." VRP 102. The State objected on the ground such evidence would be was improper opinion evidence, "his opinion that this was a civil infraction." VRP 102. Defense counsel argued that although the officer might not be able to testify as to the appropriate charge, he should be permitted to explain he did not believe the matter warranted further investigation. VRP 102.

Defense counsel also sought to question witnesses about the timing of the investigation, Lieutenant Ziesemer's role in the investigation and the outcome of the hearing on the traffic citation. VRP 96-106. The court ruled the issue of the citation had previously been determined and the evidence related to the investigation was not relevant. VRP 105. Implicit in the court's ruling was exclusion of Trooper Orf's original decision to issue a traffic citation for negligence, his opinion that no further investigation was required, and his conclusions regarding the manner

in which Ms. Wyatt drove. VRP 108-09 (court confirmed defense counsel was "not allowed to ask [Orf] what citation he issued or what his opinion of the driving was"].

Ms. Wyatt was convicted after a jury trial. *See* VRP; CP 82.

At sentencing, the court found the State had proven Ms. Wyatt's criminal history and her offender score of 8. Verbatim Report of Proceeding for 11/29/11 at 6-7. Because Vehicular Assault has a seriousness level of IV, Ms. Wyatt's standard sentencing range was 53 to 70 months. *Id.* at 7; CP 113. Noting Ms. Wyatt had no history of serious traffic matters or assaults, *id.* At 15, the court imposed a sentence of 61.5 months, plus costs and fees, and twelve months' community custody. *Id.* at 16; CP 114-16.

B. Substantive Facts

Kaylee Kinney, age 22, drove on Old Highway 99 from her home in Tenino toward I-5 and a McDonald's in Grand Mound on the evening of the accident. VRP 30-31. It was a dark, wet night. VRP 44, 72. Starting in

Tenino, the vehicle in front of Kinney was driving 25 miles per hour in a 30 mile-per-hour zone. VRP 43.

Kinney thought the vehicle drove erratically. VRP 32-33. It swerved from side to side, driving over both the white lines on the shoulder and the yellow lines in the center. VRP 33. During the approximately 5.5 miles Kinney followed the car, it crossed the center line more than four or five times. VRP 34. Kinney had her window down and could hear the sound the car she followed made as it drove over the audible bumps or rumble strips in the center yellow line. VRP 39.

The car also changed speeds, driving 10 miles under the speed limit then 10 miles over and then back and forth. For a time, it drove "like 25 in a 50-mile-per-hour speed zone." VRP 33. It also drove 50 to 60 miles per hour in that zone, then down to 35 to 40 miles per hour. VRP 33. The driving prompted Kinney to call 911. VRP 34.

The State played the recording of the 911 call for the jury. VRP 35. Prior to playing the recording, the State passed out a transcript of the recording "to

assist" the jurors "in listening." VRP 35. In the first line of the transcript, Kinney indicated she was reporting a drunk driver. VRP 193-94.

When the operator asked what she was reporting, Kinney answered, "[a] drunk driver." VRP 35. She identified the vehicle as a white Dodge Intrepid with a license plate number 454 WZR. During the call, Kinney reported the vehicle's speed changed from 30 to 40 to almost 60 miles per hour, saying "they're speeding up and swerving everywhere." VRP 36. She also said "oh oh oh" at times when the vehicle went over the white line and "the yellow line towards cars and stuff like that." VRP 38.

The white vehicle pulled over to the side of the road right after a bridge, "right before Gibson Street" and the South Sound Speedway. VRP 39-40. Kinney continued to the McDonald's in Grand Mound, seeing as she drove an SUV with "Sheriff" written on the side heading toward the vehicle. VRP 40 & 46. On her way back to Tenino from Grand Mound, Kinney saw what appeared to be an accident scene. VRP 40-41 & 46. She

also saw something on the side of the road that looked like a shopping cart. VRP 40. The white car was on the shoulder to Kinney's left, parked in front of the speedway. VRP 40-41.

Kris Ziesemer was driving his motorcycle eastbound on Old Highway 99 from a friend's house that night. VRP 51-52. It was dark, wet and could have been raining. *Cf.* VRP 72, 76, 121. To get home, he planned to turn left off 99 onto Gibson Street. VRP 52. As he approached Gibson, he slowed in preparation for the turn. VRP 66. Ziesemer saw a pair of headlights enter his lane. VRP 55. When he first saw the vehicle, he believed he was driving in the left tire path, closer to the center line than the fog line. VRP 57. In the roughly 50 feet he had to maneuver before he was hit, he moved a full lane width to get out of the way. VRP 57. He was hit by the approaching white car when he was driving on the fog line. VRP 56.

After the vehicle hit Ziesemer, the car continued down the road and pulled over onto the shoulder of the westbound lane. VRP 58. Ziesemer had landed in the

street, still basically with his bike; he scooted over until his feet were hanging in the ditch. VRP 58-59, 60. He was on his back and could see his leg moving. The femur was flexing to the left and right in a way that made him realize it was broken. VRP 59. His leg flexed as his heel hit the spokes of the still-revolving motorcycle wheel. He was in extreme pain. VRP 60. At that point, the broken leg was about six inches shorter than the other due to contraction of the muscle. VRP 62.

A woman came over to help, asking if he needed anything. He said he "needed a doctor yesterday and my parents now." VRP 61. She or her boyfriend called 911. She gave him her phone so he could call his parents. VRP 61.

Ziesemer was taken to the hospital, where a rod was inserted into femur. At the time of trial, he had a titanium rod and three pins in his leg. VRP 62. He could not return to work for 30 days after the accident and was not normal for a significant time after that.

While he considers himself close to normal now, VRP 63, his doctor advises having the leg removed. VRP 65.

A local resident, Jody Bywater, was turning left from 183rd Street into the eastbound lane of Old Highway 99 around nine to nine-thirty that night. VRP 76. As he stopped at the intersection, he saw a car in the eastbound lane heading west and slowly moving into the westbound lane. VRP 76-77, 82. The car got into the westbound lane, Bywater turned onto the highway, passed the car, and saw a downed motorcycle on the shoulder. VRP 77-78. He stopped his car, checked on the motorcyclist, and called 911. VRP 78-79. The driver he had observed earlier came to a stop a couple hundred feet away from the motorcycle. VRP 79-80.

Thurston County Deputy Sheriff Ryan Hoover was the first to respond to the accident. VRP 111. His objective was merely to preserve the scene until the state patrol arrived. VRP 112, 116. Hoover spoke with Ms. Wyatt, but could not remember if she told him anything about the accident. VRP 113-14. He remembered she "seemed a little lethargic" but nothing more

specific. VRP 116. Hoover recalled telling an investigating officer that other than the lethargy, he did not note any signs of intoxication. VRP 116-17.

Washington State Trooper Troy L. Orf, the trooper who originally cited Ms. Wyatt for negligent driving and the primary investigator at the accident scene, had been a trooper for over 21 years at the time of trial. VRP 119, 143; CP 15-16. He had extensive experience and training in collision reconstruction, detective work, accident investigation, and felony collision investigation. VRP 119-20. Orf spoke both with Ziesemer and Wyatt while they lay in ambulances at the scene. VRP 121, 126, 144. Wyatt told him she crossed the center line because she was not familiar with the area. VRP 126. Orf also spoke with a witness who had "pulled out on the roadway and observed some driving." VRP 146.

In addition to interviewing witnesses, Orf looked for evidence at the scene that would indicate what happened. He saw debris in the eastbound lane, nothing in the westbound lane. From where the motorcycle was at rest, Orf followed a scrape mark along the eastbound

shoulder for about a hundred feet down the fog line. It arced over towards the white vehicle that was at rest on the westbound shoulder with damage to the left front corner. VRP 122. A tire of the white vehicle was separated from the rim; it was the rim scraping on the ground that caused the scrape mark. From this evidence, it seemed obvious to Orf that the car had crossed the center lane and struck the motorcycle. VRP 123.

The damage to the vehicle indicated it had struck the motorcycle with its left front corner. The motorcycle was damaged on the right side where it was at rest and the left side. VRP 124. The evidence as a whole was not consistent with the motorcycle pulling out in front of the white car, but with the white car crossing the center line. VRP 140-43.

The license plate of the white vehicle matched the plate of the vehicle Kinney had reported. VRP 125-26.

Detective Juli Ann Gunderman of the Washington State Patrol was assigned to investigate the accident a year after it occurred, in November 2010. VRP 150, 156. She spoke with Ms. Wyatt on March 21, 2011. VRP 149,

153. Ms. Wyatt said on the day of the accident she was on Old Highway 99 headed toward the freeway to return to Olympia from Tenino. VRP 154. She had been at two hospitals in Olympia that day, but was not sure how she got to Tenino or why she was there. VRP 154. Ms. Wyatt told Gunderman she believed the motorcyclist had pulled out in front of her, from a road on the right side of the highway, which Gunderman believed could only have been Gibson. VRP 155. Ms. Wyatt said she swerved to miss the motorcycle, but it struck her vehicle on the right side. VRP 155-56.

Ms. Wyatt did not testify at trial.

IV. ARGUMENT

POINT I: The Trial Court Abused its Discretion in Admitting Evidence that a Witness Believed Ms. Wyatt Was A Drunk Driver

The trial court should have redacted the 911 recording and transcript because the statement that Kinney saw a drunk driver was irrelevant to the matter the State sought to prove and, in any event, any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury. A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. State v. Acosta, 123 Wn. App. 424, 431, 98 P.3d 503 (2004) (reversing where admission of defendant's criminal history was not relevant to material issues, any possible probative value was significantly outweighed by potential prejudice, and the evidence prejudiced defendant). "Abuse exists when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

In this case, the court abused its discretion in not excluding the challenged statements under Rules of Evidence 401, 402 and 403. First, the evidence was not relevant. Relevant evidence is evidence that may make a material fact more or less probable:

> means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

ER 401. Irrelevant evidence is inadmissible. ER 402; Kappelman v. Lutz, 167 Wn.2d 1, 8 n.9, 9, 217 P.3d 286 (2009) (upholding trial court ruling excluding on relevancy grounds evidence that motorcyclist involved in accident did not have license, noting such evidence would have been inadmissible if relevant due to undue prejudice).

Here, the challenged evidence was not relevant to the charged crime. The State charged Ms. Wyatt with vehicular assault by reckless driving and causing substantial bodily harm to another. CP 3; RCW 46.61.522(1)(a). She was not charged with driving while under the influence of intoxicating liquor or any drug under RCW 46.61.522(1)(b). Indeed, the State all but admitted the evidence was not relevant when it agreed it was not attempting to prove vehicular assault through the intoxication prong of the statute and acknowledged it had no evidence Ms. Wyatt was driving while drunk. VRP 10-11. Thus, Kinney's statement that she was calling about a drunk driver was not relevant

to the case as it did not make any material fact more or less probable.[1]

If this Court finds the statement was relevant, its admission was still an abuse of discretion because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403. Unfair prejudice from admission of evidence occurs whenever the probative value of the evidence is negligible, but the risk that a decision will be made on an improper basis is great. State v. Rivera, 95 Wn. App. 132, 138, 974 P.2d 882, *review granted, cause remanded*, 139 Wn.2d 1008, 989 P.2d 11 (1999). "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." State

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1. While evidence of intoxication may be evidence of recklessness, State v. Amurri, 51 Wn. App. 262, 265-66, 753 P.2d 540 (1988) in this case, the State acknowledged Kinney's statement was unfounded and the State had "no evidence that [Ms. Wyatt] was intoxicated." VRP 10-11.

v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011), *quoting*, State v. Powell, 126 Wn.2d at 264.

In Beadle, admission of evidence of a child witness's emotional breakdown was error because the evidence "was more prejudicial than probative, if probative at all." Beadle, 173 Wn.2d at 121-22 (holding the error was harmless since the jury learned about the child's mental state through properly-admitted evidence). Similarly, in State v. Johnson, this Court held testimony tending to show the defendant's wife believed the victim's statement about the defendant's molestation "served no purpose except to prejudice the jury." 152 Wn. App. 924, 934, 219 P.3d 958 (2008) (reversing for manifest constitutional error). For similar reasons here, Kinney's belief that Ms. Wyatt was drunk was likely to elicit a decision based on emotion rather than the evidence.

The idea that a person is driving while intoxicated is highly inflammatory. A person driving while drunk shows utter disregard for the safety of others. Indeed, intoxication is evidence of

recklessness. State v. Amurri, 51 Wn. App. 262, 265-66, 753 P.2d 540 (1988). In this case, however, as the State acknowledged, it had was no evidence whatsoever that Ms. Wyatt was intoxicated. VRP 10-11. Lacking actual evidence of intoxication, the State was nonetheless able to slip in the imputation of intoxication through the statement a credible eyewitness--indeed, a good Samaritan--made just minutes before the accident to a 911 operator. That statement led the jury to convict on the basis of Kinney's admittedly incorrect belief, rather than on the basis of Ms. Wyatt's actual driving.

That the statement was merely Kinney's opinion that Ms. Wyatt was a drunk driver does not make the statement less prejudicial. The State argued that Kinney's statement was not evidence Ms. Wyatt was a drunk driver, just that Kinney "called to report what she thought was a drunk driver." VRP 11. Similarly, the court held, "I think that the reference to a drunk driver when reporting erratic driving behavior is a lay way of saying this is what it appears to me." VRP 11.

However the statement is characterized, it enabled the jury to hear, through the 911 recording, and see, through the transcript of the recording, the indisputably incorrect opinion that Ms. Wyatt was driving while drunk. This opinion was highly prejudicial and should have been excluded.[2]

Finally, the trial court's error requires reversal because it materially affected the outcome of the trial. "Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial." Beadle, 173 Wn.2d 97, 120-21, *quoting*, State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). This Court assesses whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

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2. That the prosecutor acknowledged the statement was incorrect and yet did not want to redact it because of the implication that the trial would be delayed is particularly troubling. VRP 11 ("I would have to take some time redacting and somehow get around that."). Assuming the prosecutor did not realize the problem until Ms. Wyatt raised it the day of trial, redaction of one line at the beginning of the 911 recording and transcript should not have been a time-consuming task.

The incorrectly-admitted statements likely affected the outcome of this case due to both the strength of the connection between intoxication and recklessness and the State's lack of admissible evidence of Ms. Wyatt's recklessness. The State established Ms. Wyatt struck Mr. Ziesemer when she crossed over the centerline of Old Highway 99. *See, e.g.*, VRP 140-43. However, it provided no evidence that crossing the line was due to recklessness, not mere negligence or incompetence.

Ms. Wyatt did not exceed ten miles over the speed limit while Kinney followed her.[3] Indeed, the evidence makes it likely Wyatt's speed at the time of the accident was quite low. Kinney reported Wyatt brought her vehicle to a stop off the road "right before Gibson Street." VRP 40. Ziesemer was hit right after Gibson, after he had slowed for the turn onto Gibson. VRP 66. Thus, Ms. Wyatt would not have had time to get up to highway speed before the collision occurred. *Cf.* State

3. While exceeding the speed limit may be prima facie evidence of recklessness, RCW 46.61.465, the State neither relied on this presumption nor attempted to establish Ms. Wyatt's speed at the time of the accident.

v. Roggenkamp, 153 Wn.2d 614, 618, 106 P.3d 196 (2005) (defendant reckless when driving at twice speed limit in wrong lane in attempt to pass someone). She was not engaged in daring acts of driving or joyriding. *Cf.* State v. Amurri, 51 Wn. App. 262, 264 (defendant reckless when passing vehicle on two-foot wide gravel shoulder abutting deep ditch); *see* Roggenkamp, 153 Wn.2d 614, 618. She was not intoxicated. *Cf.* State v. Hill, 48 Wn. App. 344, 348, 739 P.2d 707 (1987) (defendant reckless when driving the wrong way on the freeway, not trying to avoid oncoming traffic and intoxicated). Moreover, the evidence indicates Ms. Wyatt demonstrably exercised caution to the extent that she drove under the speed limit, VRP 33 & 43, and pulled over to the side of the road to let Kinney pass her. VRP 39-40.

Indeed, without evidence of joyriding, excessive speeding, or intoxication, the jury was likely at a loss as to why Ms. Wyatt was driving erratically. *See* Verbatim Report of Proceedings for 11/29/11 (trial judge stated, "What was most mysterious throughout this

trial is how this accident occurred."). Thus, jurors would be particularly prone to latch on to Kinney's opinion as to intoxication as the explanation and, through that impermissible opinion, find Ms. Wyatt behaved recklessly.

Under all these circumstances, the admissible evidence failed to prove recklessness, the inadmissible evidence prejudiced Ms. Wyatt, and this Court should reverse Ms. Wyatt's conviction.

Point II: The Trial Court Abused Its Discretion in Excluding Trooper Orf's Opinion that Ms. Wyatt Drove Negligently and His Determination that No Further Investigation was Required

The trial court improperly denied Ms. Wyatt's request to question Trooper Orf about his conclusions regarding the accident. A trial court's decision to exclude evidence will be reversed only where it has abused its discretion. Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009), *citing*, State v. Lord, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). "A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. This includes when its discretionary decision is

contrary to law." State v. Nation, 110 Wn. App. 651, 661, 41 P.3d 1204 (2002) (citations omitted).

In this case, the trial court's exclusion decision was an abuse of discretion as it was contrary to law. Although the court did not explain its reason for excluding the line of questioning defense counsel sought to pursue, the record indicates it did so for one of three reasons: 1) it was precluded by collateral estoppel, VRP 105 (stating the issue of the traffic citation "has been decided and determined earlier in this case"); 2) it found the subject matter irrelevant, VRP 105 (stating, "I don't believe any of that information [about the investigation] is relevant to the jury's decision about whether the defendant has committed this crime"); or 3) it held the testimony would have been improper opinion testimony. VRP 102 (the State argued the trooper could not be questioned about these matters because his testimony would constitute improper opinion). None of these reasons presents a legal ground for excluding the evidence.

First, the matter had not been resolved at an earlier hearing. Ms. Wyatt had never before sought to introduce evidence about Trooper Orf's investigation into the accident. The only matter resolved earlier was Ms. Wyatt's double jeopardy claim. See Verbatim Report of Proceedings for 10/17/11. Thus, to the extent the court excluded the requested questioning for this reason, it abused its discretion as the reason was incorrect as a matter of law.

Next, the line of inquiry was relevant because it would have shed light on a material question of fact: Ms. Wyatt's manner of driving. *See* ER 401. Trooper Orf had spoken with Ms. Wyatt, Mr. Ziesemer, and a witness the night of the accident. VRP 121-22, 126, 146. He had investigated the accident scene. VRP 122-43. He inventoried Ms. Wyatt's vehicle. VRP 136. After doing all these things, he apparently determined Ms. Wyatt had operated her vehicle in a negligent manner and no further investigation was required. *See* CP 15-16. Under these circumstances, his considered opinion as to how

Ms. Wyatt drove her vehicle was directly relevant to the issue of whether she drove recklessly.

Indeed, it is hard to understand how the court could rule Kinney's admittedly incorrect opinion that Ms. Wyatt was a drunk driver was relevant and yet Trooper Orf's expert opinion that she operated her vehicle in a negligent manner was not. For these reasons, to the extent the trial court excluded the evidence on relevancy grounds, it abused its discretion.

Further, the opinion evidence was admissible as expert opinion testimony:

> We allow experts to express opinions concerning their fields of expertise when those opinions will assist the trier of fact. ER 702; ER 701. The mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion.

State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008), *citing*, State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Indeed, Rule of Evidence 702 expressly permits an expert to testify as to his or her area of expertise "in the form of an opinion or

otherwise." ER 702. Rule of Evidence 704 is even more expansive, explicitly allowing otherwise admissible opinion testimony that "embraces an ultimate issue to be decided by the trier of fact." ER 704.

While certain types of opinion testimony are excluded by the courts, none of these exclusions is applicable here. Excluded opinions include: "opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." Montgomery, 163 Wn.2d 577, 591 (citations omitted) (holding opinion testimony that went to the defendant's intent improper). In this case, Ms. Wyatt was not asking for an expression of the trooper's personal beliefs, but rather his expert conclusions based on his analysis of the accident site. Moreover, she did not seek to ask Orf's opinion of any of the excluded topics: guilt, intent, or the credibility of any witness. Instead, Ms. Wyatt sought to know, based on Orf's extensive analysis and expertise, what he concluded about how she operated the

vehicle.[4] Thus, under these criteria, the opinion should have been admitted.

Courts use a separate analysis to determine whether testimony constitutes an impermissible opinion about the defendant's guilt. This analysis considers "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." State v. King, 167 Wn.2d 324, 332-33, 219 P.3d 642 (2009) (citations and internal quotation marks omitted). Analysis of these considerations also compels the conclusion the evidence should have been admitted.

First, Orf clearly qualified as an expert in collision analysis and the State used him as such.[5]

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4. Notably, whether the manner of driving was negligent or reckless is not a question of intent. No intent is required for either reckless or negligent behavior. *See* RCW 9A.08.010; *see also*, State v. Christman, 160 Wn. App. 741, 753, 249 P.3d 680 (2011) (in discussion of causation, quoting Wayne R. LaFave, Substantive Criminal Law § 6.4, at 464 (2d ed. 2003), which noted the difference between crimes requiring intent and those that do not: "the result intended (with intent crimes) or hazarded (with reckless or negligent crimes)").

5. "In 1991 I graduated from the Washington State Patrol Academy. . . . In 1993 I went through advanced collision training; 1994, technical specialist training. In 2009 I became a collision reconstructionist and went through the detective basic training at

Next, as discussed above, his testimony would have been his expert conclusions based on his examination of the evidence, expert testimony explicitly allowed by Rule of Evidence 702. While the primary issue before the jury was whether Ms. Wyatt operated her vehicle negligently or recklessly, the subject of Orf's testimony, opinion testimony is allowed even as to "ultimate issues." ER 704.

Opinion testimony addressing an ultimate issue short of guilty is permissible. City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). In Heatley, at a trial to determine whether the defendant was guilty of driving while intoxicated, a police officer testified, "Based on my, his physical appearance and my observations of that and based on all the tests I gave him as a whole, I determined that Mr. Heatley was obviously intoxicated and affected by the

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the Washington State Patrol Academy. I've also been trained in human factors involving pedestrians and training in interrogation and other such training that goes alone with detective work." VRP 119. "Major Accident Investigation Team I was on for three years. We travel the state and investigate collisions involving three or more fatalities, collisions involving state workers who were killed." VRP 120. "I worked at the Criminal Investigation Division in Tacoma which covered felony collisions in both Thurston and Pierce County." VRP 120.

alcoholic drink that he'd been, he could not drive a motor vehicle in a safe manner." 70 Wn. App. 573, 576, 579. In other words, the officer expressed his opinion that the defendant was "obviously intoxicated."

The court held this testimony was permissible opinion testimony, even though it went to an ultimate jury issue:

> Officer Evenson's testimony contained no direct opinion on Heatley's guilt or on the credibility of a witness. The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. "[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." [citation omitted] More important, Evenson's opinion was based solely on his experience and his observation of Heatley's physical appearance and performance on the field sobriety tests. The evidentiary foundation "directly and logically" supported the officer's conclusion.

Heatley, 70 Wn. App. 573, 579-80 (citation omitted). *See also* State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992) (in prosecution for possession of cocaine with intent to deliver, police officer's opinion that lack of drug-user paraphernalia indicated defendant did

not use drugs was not an opinion on guilt when testimony was based on physical evidence and officer's experience).

For the same reasons the opinion testimony was admissible in Heatley, it was admissible here. Here, while Trooper Orf's testimony would have gone to an ultimate issue of fact, it would not have been an expression of guilt. Moreover, similar to the police officer' testimony in Heatley, Orf's opinion would have been based solely on his experience and observations at the accident site. Although the opinion would have implied Ms. Wyatt was not guilty of recklessness, as Heatley held, it is that "very fact" that made "the evidence relevant and material." Heatley, 70 Wn. App. 573, 579. Under these circumstances, to the extent the trial court excluded the testimony on the grounds that it would have been improper opinion evidence, it abused its discretion.

Next, the trial court's erroneous exclusion of Trooper Orf's testimony, within reasonable probabilities, materially affected the outcome of the

trial. Beadle, 173 Wn.2d 97, 120-21. This conclusion is compelled by measuring the inconclusiveness of the State's evidence of recklessness, see Point I above, against the impact Trooper Orf's testimony would have had on the jury. If the jury had heard the highly-trained and -experienced State Trooper Orf testify that, on the basis of his thorough investigation and analysis, he concluded Ms. Wyatt was driving negligently, it would likely have acquitted her of driving recklessly. The trial court's erroneous exclusion of this evidence thus deprived Ms. Wyatt of a fair trial. For all these reasons, this Court should reverse Ms. Wyatt's conviction.

Finally, if this Court finds that neither the admission of Kinney's opinion that Ms. Wyatt was "a drunk driver" or the exclusion of Trooper Orf's opinion as to the manner in which she drove was prejudicial by itself, the combined impact of the two errors harmed Ms. Wyatt. *See* State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The trial court's admission of the highly prejudicial--and admittedly false--opinion that

Ms. Wyatt was "a drunk driver," combined with its exclusion of Orf's opinion--based on his expertise, examination of the accident cite, interviews with witnesses, and inventory of her vehicle--that Ms. Wyatt operated her vehicle in a negligent manner, together made the guilty verdict inevitable. The two errors harmed Ms. Wyatt, deprived her of a fair trial, and require reversal.

POINT III: The State Failed To Prove Ms. Wyatt Operated Her Vehicle In a Reckless Manner, Requiring Reversal

The evidence at trial was insufficient as a matter of law to prove Ms. Wyatt guilty of vehicular assault as charged. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's

evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201.

To prove the charged crime in this case, the State was required to prove beyond a reasonable doubt that Ms. Wyatt operated or drove the vehicle "[i]n a reckless manner and cause[d] substantial bodily harm to another." RCW 46.61.522(1)(a); CP 3; CP 76 (Jury Instruction No. 7). The only real issue before the jury was whether Ms. Wyatt operated a vehicle in a reckless manner. "To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner indifferent to the consequences. CP 79 (Jury Instruction No. 10). The State failed to prove reckless driving.

As argued in the prejudice prong of Point I, above, while the State established Ms. Wyatt struck Mr. Ziesemer when she crossed over the centerline of Old Highway 99, it provided no evidence that crossing the

line was due to recklessness, not mere negligence or incompetence.

The primary evidence of the manner in which Ms. Wyatt drove came from Kinney. Kinney testified Ms. Wyatt drove 25 miles per hour in a 30 mile-per-hour zone, VRP 43, and about 25 in a 50-mile-per-hour zone. VRP 33. These speeds indicate an excess of caution, not negligent or reckless driving. Ms. Wyatt again exercised caution when she pulled over to the side of the road to let Kinney pass her. VRP 39-40. Caution, obviously, is inconsistent with recklessness.

Kinney additionally observed Ms. Wyatt's car change speeds, driving 10 miles under the speed limit then 10 miles over and then back and forth. VRP 33. This was not evidence of reckless driving. Most people drive at varying speeds. Kinney also testified Ms. Wyatt swerved from side to side, driving over both the white lines on the shoulder and the yellow lines in the center. VRP 33. As Kinney described this behavior, however, it was consistent with distracted, negligent, or incompetent driving, not reckless driving.

The fact of the accident itself was the State's strongest evidence as to Ms. Wyatt's manner of driving: She hit Mr. Ziesemer after crossing the yellow line while he was driving on the fog line of his lane. VRP 56. However, the fact of the accident, when coupled with the caution Ms. Wyatt also exhibited, and taken together with her other driving behavior, was insufficient evidence Ms. Wyatt drove in "a rash or heedless manner indifferent to the consequences." A person may not be able to explain how an accident happened, jurors may not know why a car crossed the yellow line, but that does not make the driver's behavior reckless.

As discussed in Point I, there was no evidence here of joyriding, excessive speeds, or intoxication. Without something more than the driving behaviors the State proved, its evidence of erratic driving failed to establish recklessness. *See, e.g.*, State v. Roggenkamp, 153 Wn.2d 614, 618, 106 P.3d 196 (2005) (defendant reckless when driving at twice speed limit in wrong lane in attempt to pass someone); State v. Amurri, 51

Wn. App. 262, 264, 753 P.2d 540 (1988) (defendant reckless when passing vehicle on two-foot wide gravel shoulder abutting deep ditch); State v. Hill, 48 Wn. App. 344, 348, 739 P.2d 707 (1987) (defendant reckless when driving the wrong way on the freeway, not trying to avoid oncoming traffic and intoxicated).

For all these reasons, the State failed to prove Ms. Wyatt operated a vehicle in a rash or heedless manner indifferent to the consequences, it failed to prove vehicular assault as charged, and this Court should reverse her conviction.

V. CONCLUSION

For all of these reasons, Shila Jean Wyatt respectfully requests this Court to reverse her conviction.

Dated this 8th day of June 2012.

Respectfully submitted,

/s/ Carol Elewski
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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 8th day of June, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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/s/ Carol Elewski
Carol Elewski

ELEWSKI, CAROL ESQ

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